

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

14 Cr. 160 (VEC)

5 FRANK DiTOMASSO,

6 Defendant .

7 -----x  
8 New York, N.Y.  
9 April 21, 2017  
3:30 p.m.

10 Before:

11 HON. VALERIE E. CAPRONI,

12 District Judge  
13

14 APPEARANCES

15 JOON H. KIM  
16 Acting United States Attorney for the  
Southern District of New York  
17 BY: MARGARET GRAHAM  
KIMBERLY J. RAVENER  
PETER CALABRESE  
18 Assistant United States Attorney

19 COHEN & FUNK, P.C.  
Attorneys for Defendant  
20 BY: LORI COHEN  
ARTHUR K. WOMBLE, JR.  
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1 (Case called)

2 MS. GRAHAM: Good afternoon, your Honor. Margaret  
3 Graham on behalf of the government, joined by AUSA Kimberly  
4 Ravener and Peter Calabrese, who were also with me in trial.

5 THE COURT: Good afternoon.

6 MS. COHEN: Good afternoon, your Honor. Lori Cohen.  
7 With me is Ken Womble and my client, Mr. DiTomasso.

8 THE COURT: Good afternoon.

9 Good afternoon, Mr. DiTomasso.

10 THE DEFENDANT: Hello, your Honor.

11 THE COURT: Okay. Ms. Cohen, would you like to be  
12 heard on your motion?

13 MS. COHEN: Yes, Judge, just briefly. We have fully  
14 briefed the motion, as the Court's aware.

15 Let me just state at the outset, it's always difficult  
16 to call another lawyer ineffective. I mean, that's not a  
17 popular stance. I don't care about it being popular, but it is  
18 uncomfortable.

19 So I do want to say that Mr. Ginsberg is an  
20 experienced trial lawyer, and we're not alleging he is an  
21 incompetent lawyer, but we are saying in the facts of this  
22 case, what he did was ineffectively represent Mr. DiTomasso at  
23 the trial.

24 The government has spent a lot of time in its brief  
25 talking about what he did pretrial. He certainly litigated

1 this case pretrial. There is no doubt about that. However,  
2 it's our position that, once Robert Marcus came to him and  
3 indicated to him that he was the real perpetrator in this  
4 case -- and as another aside, we know that's why he -- what he  
5 said because Mr. Ginsberg immediately called the government and  
6 indicated he needed an attorney. So --

7 THE COURT: Well, that doesn't mean he confessed.

8 MS. COHEN: No, it does not. But I -- and I've  
9 thought a lot about that, because I think that's a pivotal  
10 point, really, in this entire process.

11 Clearly, Mr. Marcus said something to Mr. Ginsberg  
12 that would have indicated Mr. Marcus required an attorney.

13 THE COURT: Right. But isn't part of the premise of  
14 your argument that either Mr. Marcus is guilty or Mr. DiTomaso  
15 is guilty, and it ignores the possibility that they're both  
16 guilty?

17 MS. COHEN: I think our argument is that Mr. Marcus  
18 saying that he was guilty would have changed the outcome of  
19 Mr. DiTomaso's trial. I don't think we opine on whether  
20 they're both guilty or not, and certainly that's something the  
21 government can argue. But I think in a case like this, which  
22 was substantially circumstantial --

23 THE COURT: It was an overwhelming circumstantial  
24 case. I'm not sure it was all circumstantial. There was a  
25 fair amount of direct evidence.

1 MS. COHEN: I would say, your Honor, the only direct  
2 evidence are the video chats.

3 THE COURT: That would be the evidence I would be  
4 talking of.

5 MS. COHEN: That would be. Mr. DiTomasso has  
6 explained in his testimony how that video evidence could have  
7 come into being. But I think when -- you know, we're all --  
8 we've all been lawyers for a long time, and when you're faced  
9 with somebody telling you that they are the perpetrator of the  
10 crime, which is what Mr. Marcus has said he told Mr. Ginsberg  
11 on more than one occasion, and you are then faced with a trial  
12 which is largely circumstantial -- they can tie the IP  
13 addresses to a location, they can tie the email addresses to a  
14 location -- when there are pieces of that circumstance that can  
15 also point to another person, some of the IP addresses are to  
16 an account that's in Mr. Marcus' name -- some of the National  
17 Center for Children Report forms were, in fact, made about  
18 Mr. Marcus -- when you have these pieces that can be turned  
19 from all pointing at your client to pointing to another person  
20 who has means and opportunity, and he's now telling you that he  
21 might, in fact, have been culpable, is just is beyond, I think,  
22 comprehension that he was not called as a witness when  
23 available. And that's basically the bottom line of our  
24 argument. Thank you.

25 THE COURT: All right. Thank you, Ms. Cohen.

1 Ms. Graham.

2 MS. GRAHAM: Your Honor, as you noted, our main point  
3 is that the evidence was overwhelming against Mr. DiTomasso,  
4 both circumstantial and very important direct evidence. I  
5 mean, it's rare that you actually have images of the defendant  
6 committing the offense, and that is, in fact, exactly what we  
7 had here, what we showed the jury, and what we provided in  
8 redacted form to your Honor. Even if Mr. Marcus had testified,  
9 it would not have made a difference in the outcome of the case.

10 But stepping back from that, I would submit that  
11 Mr. Marcus' affidavit is, on its face, not credible, and your  
12 Honor can determine without the need for a hearing to examine  
13 his or Mr. Ginsberg's credibility. Then, in fact, based on the  
14 other evidence in the record, which we set forth before your  
15 Honor, and I'm happy to answer any questions about, but I won't  
16 belabor by repeating again here, that it's simply not credible  
17 his claim that he confessed to Mr. Ginsberg multiple times and,  
18 in fact, wanted to come forward.

19 Just to address two points that were recently made.  
20 Mr. Ginsberg noted that he asked for an attorney for  
21 Mr. Marcus, and we provided one, based upon hypothetical  
22 statements that Mr. Marcus had made about what would happen if  
23 he came forward, and this is consistent with the entire record  
24 which shows Mr. Marcus toying with this idea, urged by the  
25 defendant of coming forward, but ultimately deciding not to,

1 which you can see most clearly really in the February 17th call  
2 that we've excerpted for you. And I know that that's already  
3 before your Honor.

4 One thing I wanted to point out that we maybe did not  
5 make as clear in our brief is the timing of that call. Our  
6 final pretrial conference was on January 25th, 2016. That was  
7 a Monday. Trial was scheduled to start the next Monday. Now,  
8 at that conference, Judge Scheindlin said -- and it's in the  
9 transcript -- the defendant had asked to adjourn the trial for  
10 many reasons, one of which was that his uncle might not be able  
11 to attend, and Judge Scheindlin said -- and this is on page 5  
12 of that transcript which is attached in our exhibits -- "His  
13 final argument is that his uncle may not be available during  
14 trial, but that can't be helped either. He is not a necessary  
15 witness. I realize he's family support, but it is not as if  
16 this is the key witness in the trial. In no way has anybody  
17 told me this is a key witness. I can't say that's a basis for  
18 adjournment."

19 And there was no argument by defendant at that point,  
20 who had shown himself well able to address the Court sua sponte  
21 on other occasions and in other conferences. So that happens  
22 on January 25th.

23 On February 1st, the next Monday, the trial is  
24 scheduled to start, and everyone believes it will start until  
25 Saturday morning there is a call between Judge Scheindlin and

1 counsel that, based on personal circumstances, the trial is  
2 going to have to be adjourned.

3 This phone call between Mr. Marcus and the defendant,  
4 where it is clear that Mr. Marcus is not in any way prepared to  
5 testify, and in fact wants to come forward in a kind of what he  
6 calls analogous to the Central Park jogger case, he wants to  
7 come forward and confess after the trial. So he is in no way  
8 saying that he's ready to testify happened on February 17th.  
9 That's 16 days after trial was supposed to have begun, which  
10 again shows that, based on the record before you, without the  
11 need for a hearing, you can find that Mr. Marcus' claims now  
12 are simply not credible.

13 It's obviously an incredibly high standard. We don't  
14 think they've met it. and If you have any further questions,  
15 we would otherwise rest on your briefs.

16 THE COURT: Thank you.

17 Ms. Cohen.

18 MS. COHEN: Your Honor, may I just address that for a  
19 moment? I do think there's another way of looking at that in  
20 that it does in some way confirm Mr. Marcus' affidavit that he,  
21 in fact, was the true perpetrator, because I think their  
22 thinking was they would go to trial, Mr. DiTomasso would go to  
23 trial, and if he was acquitted, then fine, Mr. Marcus didn't  
24 have to get on the stand and admit his culpability. But once  
25 Mr. -- if Mr. DiTomasso got convicted, then Mr. Marcus, the

1 true perpetrator, would come forward, as happened in the  
2 Central Park case. So I think that cuts both ways. I think  
3 that that also can confirm exactly what Mr. Marcus says in his  
4 affidavit.

5 I would just also point out, your Honor, there are a  
6 few moments in a career when you can put the real perpetrator  
7 on the stand. I can't imagine, as a trial attorney, a more  
8 valuable piece of information or testimony to add to a trial  
9 than someone else testifying they perpetrated the crime. So  
10 it's difficult -- it is an incredibly high standard, and I  
11 think a difficult standard in that I don't know that any of us  
12 can say for sure what would have changed the outcome of this  
13 trial, but I do think, of all the possible evidence that could  
14 be introduced at a trial, the fact that someone else  
15 perpetrated it and takes the stand and says that is probably  
16 the most valuable piece.

17 MS. GRAHAM: Your Honor, if you would just indulge me  
18 for one more statement --

19 THE COURT: I'll indulge you for one more.

20 MS. GRAHAM: -- since you didn't have to sit through  
21 the whole trial --

22 THE COURT: I read the entire transcript.

23 MS. GRAHAM: Okay. Excellent.

24 In Exhibit F, which we've put before you, the May 30  
25 call, at the very end, Frankie makes a comment which addresses



1 this entire issue of the idea that Mr. Marcus was wanting to  
2 come forward and testify.

3 He's discussing the mistrial motion with Mr. Marcus.  
4 And again, it's Exhibit F. At the very end he says, "The judge  
5 will likely not grant it, and even if she does, "I hope you  
6 don't try to pull what you did last time, you know, and, well,  
7 we can see what happens with that because I'm only doing this  
8 to get a new lawyer, to get more time to try to bring to light  
9 what -- you know, what should have happened before this trial,  
10 but I'll talk to you more about this Wednesday," which is  
11 presumably an in-person meeting, showing, again, that  
12 Mr. Marcus was in no way prepared to testify before trial. And  
13 even May 30th, after the guilty conviction has come in, Frankie  
14 is still concerned that he might again try to delay and  
15 ultimately not testify.

16 THE COURT: Okay. I'm prepared to rule orally.

17 The defendant has moved, pursuant to Rule 33, for a  
18 new trial, arguing that he was deprived of effective assistance  
19 of counsel because his trial counsel, Lee Ginsberg, had no  
20 trial strategy.

21 Defendant asserts that lack of strategy resulted in  
22 Mr. Ginsberg's failure to call as the witness "the one person  
23 who could not only confirm Mr. DiTomasso's testimony, but who  
24 could exonerate DiTomasso".

25 Defendant's argument has essentially two elements;

1 Mr. Ginsberg lacked a coherent strategy generally, and  
2 specifically he failed to call as a witness DiTomasso's uncle,  
3 Robert Marcus, who had allegedly previously told Mr. Ginsberg  
4 that he, and not the defendant, was responsible for these  
5 crimes.

6 The Court finds that neither argument satisfies the  
7 extraordinary circumstances necessary for the Court to vacate  
8 the conviction and to order a new trial.

9 Starting with whether Mr. Ginsberg had a trial  
10 strategy. The Court has reviewed the trial transcript and does  
11 not agree with defendant's argument that there was no  
12 discernible strategy. Defense counsel was faced with an  
13 overwhelming amount of evidence that pointed straight at the  
14 defendant. It was a rational strategy to focus attention on  
15 trying to persuade the jury that the government's evidence was  
16 not sufficient to prove defendant guilty of the more serious  
17 production charge. To have any hope of prevailing, it was  
18 critical that defense counsel maintain his credibility with the  
19 jury. To do that, he needed to avoid making arguments that  
20 were simply preposterous. He managed to do that. Although  
21 defendant now complains that Mr. Ginsberg did not cross examine  
22 all of the government's witnesses, the Court finds that he made  
23 competent, strategic decisions regarding cross examination.

24 To that end, he cross examined the Time Warner  
25 employee and established that its records showed a different

1 activation date for the IP address than for the account as a  
2 whole -- that's at page 78 to 79 of the transcript -- and that  
3 Time Warner does not know who was using the IP address, it can  
4 only identify the address at which the IP address was used --  
5 that's at transcript 81 and 82.

6 He cross examined several witnesses to establish that  
7 there was no evidence that defendant was ever given the user  
8 name or password of the victim's Dropbox account, and that  
9 certain witnesses could not prove that the account was ever  
10 accessed by anyone other than the originator. See transcript  
11 206, 242 to 43, and 620.

12 He did a little damage to the FBI CART examiner by  
13 establishing that, although the CART examiner had difficulties  
14 fully reconstructing data from the X-Box, he did not make any  
15 effort to consult with Microsoft, the manufacturer of the  
16 machine. That was at 343 to 44 of the transcript.

17 Finally, his cross examination of the case agent  
18 undercut the implication that the CART examiner had created  
19 that CART does a "peer-review" of the forensic work done by the  
20 case agent -- that's transcript 603 -- and established that  
21 there were attempts to communicate with the victim after  
22 February 2nd, but no actual contact -- that's transcript  
23 page 617 to 619.

24 While the cross examination was not devastating, it  
25 was consistent with the strategy of the focusing on the

1 potential weaknesses of the production charge.

2           That theme continued into the summation with  
3 Mr. Ginsberg asking the jury to focus on the fact that the  
4 encounters between defendant's IP address and the victim on  
5 October 6th and November 28th were live video exchanges that  
6 did not result in a recording. While that is not legally a  
7 defense, it was clear that the defense hoped that the jury  
8 would insist on there being something tangible to find that  
9 production had been actually proven. As to February 1, he  
10 advanced a coherent argument that there was no evidence that  
11 defendant encouraged the victim to create the video that was  
12 uploaded that day.

13           Although the defendant complains about language in the  
14 defense summation telling the jury that, even if they did not  
15 believe defendant's testimony, they still had to hold the  
16 government to its proof, the Court finds that argument was a  
17 reasonable strategy. Defendant's testimony was close to  
18 laughable. Under those circumstances, it was rational for  
19 Mr. Ginsberg to keep the jury focused on the government's  
20 burden of proof rather than to attempt to cobble together  
21 arguments based on what was obviously perjured testimony.

22           In short, although Mr. Ginsberg did not launch a  
23 successful defense, given what he had to work with, including  
24 his client's unwise decision to testify, it was a coherent  
25 strategy. It was far from ineffective assistance.

1 As to the failure to call Mr. Marcus, the Court starts  
2 with the fact that an attorney's decision not to call a  
3 particular witness for tactical reasons does not satisfy the  
4 standard for ineffective assistance. United States versus  
5 Eyman, 313 F.3d 741 at 743. It's a 2d Cir. 2002 decision.

6 Thus, even if all of the facts were as defendant  
7 asserts and Mr. Marcus had told Mr. Ginsberg that he was the  
8 guilty party and that his nephew was entirely innocent, the  
9 decision not to call Marcus would not establish ineffective  
10 assistance.

11 In this case, though, there is substantial reason to  
12 question that those facts are accurate. First, Mr. Ginsberg,  
13 as an officer of the court, denies that Marcus told him that  
14 he, not the defendant, was the guilty party.

15 Second, the undisputed facts tend to confirm that  
16 neither Mr. Ginsberg nor Mr. DiTomasso believed that Marcus was  
17 a potential witness. The jail conversation between DiTomasso  
18 and Marcus confirms that defendant wanted to pursue a strategy  
19 of pointing the finger at his uncle, not that his uncle was  
20 prepared to state under oath that he had engaged in a very  
21 elaborate job of framing his nephew, but was now ready to  
22 testify and confess to the crimes.

23 Further, it is undisputable that Mr. DiTomasso raised  
24 many issues regarding his defense directly with Judge  
25 Scheindlin, but when it came time to discuss whether there

1 would be a defense case, he did not mention that his uncle had  
2 confessed to his attorney and should be called as a witness.  
3 To the contrary, he made clear that he, the defendant, was the  
4 only potential witness in his behalf.

5 Further undercutting defendant's argument, his post  
6 trial letter which kicked off the subsequent motion by his new  
7 attorney did not raise this as an issue. Instead, the  
8 defendant focused entirely on his view that an X-Box cannot do  
9 the things the trial witnesses said it did. That was the issue  
10 that he believed deprived him of a fair trial, not his current  
11 claim that his lawyer was inept because he failed to call his  
12 attorney as a witness.

13 In short, the defendant's motion for a new trial is  
14 denied.

15 Ms. Cohen, how long do you want to get ready for  
16 sentence?

17 MS. COHEN: Your Honor, I know that Mr. DiTomasso at  
18 one point had been interviewed by --

19 THE COURT: We have a presentence report and a  
20 psychosexual report.

21 MS. COHEN: That was my question. I hadn't received  
22 any of those, so I will, I guess, manage to get them. Does the  
23 government have them?

24 MS. GRAHAM: I think so, yes. We can send them to  
25 you.

1 MS. COHEN: A month, your Honor?

2 THE COURT: Okay. If you don't have the report yet, I  
3 will give you a month. Today is the 21st, right?

4 MS. GRAHAM: Yes, your Honor.

5 THE COURT: So can you be ready May 19th, with  
6 submissions due on May 12th?

7 MS. COHEN: Yes, Judge.

8 THE COURT: Okay. So do we have a time on May 19th,  
9 Mr. Brantley?

10 THE DEPUTY CLERK: 3:30.

11 THE COURT: 3:30 on the 19th?

12 MS. COHEN: Yes, that's fine.

13 THE COURT: I see nods all around. Okay. I will see  
14 you all on May 19th at 3:30.

15 Anything further from the government?

16 MS. GRAHAM: Nothing from the government, your Honor.

17 THE COURT: Ms. Cohen, anything from you?

18 MS. COHEN: No, your Honor.

19 THE COURT: All right. Thank you all.

20 (Adjourned)

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